

April 17, 1998

Ms. Carol M. Browner
Administrator
United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Browner:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel convened for EPA's proposed rulemaking on the Underground Injection Control (UIC) regulations for Class V injection wells. These are generally shallow wells or other devices used to inject fluids either directly into an underground source of drinking water (USDW), or into the subsurface that overlies a USDW. Class V wells are subject to the UIC regulations promulgated under the authority of Part C of the Safe Drinking Water Act. This rulemaking is a reproposal, in response to substantial public comments, of a 1995 notice of proposed rulemaking (60 FR 44652, August 28, 1995). This proposal addresses potential high risk Class V shallow waste disposal wells located in Source Water Protection Areas (SWPAs).

On February 17, 1998, EPA's Small Business Advocacy Chairperson (Thomas E. Kelly) convened this Panel under section 609(b) of the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). In addition to its chairperson, the Panel consists of the Director of the Office of Ground Water and Drinking Water within EPA's Office of Water, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel for Advocacy of the Small Business Administration.

It is important to note that the Panel's findings and discussion are based on the information available at the time this report was drafted. EPA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process and from public comment on the proposed rule. Any options the Panel identifies for reducing the rule's regulatory impact on small entities may require further analysis and/or data collection to ensure that the options are practicable, enforceable, environmentally sound and consistent with the Safe Drinking Water Act.

Summary of Small Entity Outreach

The rule being considered would potentially affect owners and operators of three categories of

Class V injection wells in SWPAs delineated for community water systems and non-transient non-community water systems that use ground water as a source. The three categories of Class V wells subject to the current draft of the proposed rule are: (1) motor vehicle waste disposal wells; (2) industrial wells; and (3) large-capacity cesspools.

EPA has sought and obtained input from states, local government entities, and industries throughout the development of the Class V UIC regulations. Rule development activities prior to the 1995 proposal included regular coordination with State and EPA Regional staff who conducted outreach to the regulated community to solicit opinions about the modifications to the Class V UIC program that EPA was planning to propose. Small entities targeted by this outreach included owners and operators of auto dealers and service stations. At the same time, EPA also convened “light” industry focus groups that included representatives from the automotive service, petroleum marketing, funeral, photofinishing, and metal finishing industries, among others.

The 1995 proposal provided an additional opportunity for input by small entities. Since that time, EPA’s Office of Ground Water and Drinking Water (OGWDW) has conducted outreach directly to representatives of small entities that would be affected by the proposed rule as required by SBREFA. EPA, in consultation with SBA, identified 18 small entity representatives (SERs) that were most likely to be affected by the proposed rule. Beginning in December, 1997, EPA prepared and distributed outreach materials including a draft Initial Regulatory Flexibility Analysis to the SERs. The OGWDW received 11 sets of written comments from SERs prior to the convening of the Panel on February 17, 1998. In addition, oral comments were provided to OGWDW during a telephone conference call on January 15, 1998. Six additional sets of written comments from SERs were received by the Panel after it convened. The Panel also conducted outreach through a face-to-face meeting with the SERs on March 5, 1998, in Washington, DC. Summaries of all comments received by both OGWDW and the Panel are provided in the Panel report. The complete written comments of the SERs are also attached to the report.

In addition, EPA has been convening stakeholder meetings to inform potentially affected entities, including small businesses, of the requirements under consideration for the proposed rule and to solicit feedback. To date, EPA has held three stakeholder meetings, one in Washington, DC, on January 20, 1998, one in Chicago, IL on January 27, 1998, and one in San Francisco, CA on February 19, 1998.

Panel Findings and Discussion

Under the RFA, the Panel is to consider four regulatory flexibility issues related to the potential impact of the rule on small entities: (1) the type and number of small entities to which the rule will apply; (2) record keeping, reporting and other compliance requirements applicable to small entities; (3) the

rule's interaction with other Federal rules; and (4) regulatory alternatives that would minimize the impact on small entities consistent with the stated objectives of the statute authorizing the rule. The Panel's findings and discussion with respect to each of these issues are summarized below. In addition, the Panel discussed several issues related to the general approach currently being considered by EPA for the proposed rule.

Major Topics of Panel Discussion. The Panel discussed statements by a number of SERs suggesting that the existing UIC program, in conjunction with EPA's 1995 proposal to address high risk Class V wells through a management and closure strategy using existing authorities, is adequate to protect USDWs. EPA responded that the proposed approach would have addressed all Class V wells, regardless of the level of risk they pose to USDWs, with one approach, and thus failed to adequately address high risk wells that threaten public drinking water supplies. EPA also believes that the 1995 proposal did not provide for consistent public health protection nationwide because it did not establish a clear baseline program for States to follow and therefore could allow inadequate controls in those situations where there is inadequate information and/or inadequate resources to address Class V wells. Other Panel members believed that EPA has little new information to suggest that its earlier proposed approach is inadequate, and urged EPA to consider expanding its current permit-by-rule approach to require the use of appropriate management practices while maintaining the flexibility of state UIC programs to tailor their programs to local conditions. The Panel did not reach closure on this issue.

A number of commenters also questioned whether EPA has adequate data to support its blanket characterization of all Class V motor vehicle and industrial wells in SWPAs as "high risk." Some of these commenters indicated that automotive service facilities, in particular, have adopted management practices over the past decade, such as recycling of used oil and antifreeze and spill prevention and control programs, that have significantly reduced both the volume and the toxicity of their injectate. Some Panel members expressed concern that EPA's data regarding contamination of USDWs from such wells consists largely of individual case studies, rather than a systematic statistical correlation between injection in such wells and contamination of USDWs. EPA responded that its evaluation of the risk from such wells is based on the combined professional judgement of EPA and State geologists and engineers that are responsible for implementing the Class V UIC program, and has been documented in its 1987 Report to Congress and numerous other reports and studies, including contamination studies performed by State regulators, sampling data obtained from prior Class V well closures, and various outreach documents published by States. EPA also noted that its position that motor vehicle waste disposal wells should be banned is consistent with guidance put out by the American Petroleum Institute recommending that such wells be closed. The Panel also did not reach closure on this issue.

Some members of the Panel also questioned whether it was necessary to require all industrial wells in SWPAs to meet MCLs at the point of injection and suggested that EPA consider the possibility

of allowing the injectate to meet some higher multiple of the MCL for certain contaminants under certain conditions, given the fact that some contaminants (e.g., metals) are significantly attenuated by percolation through the soil prior to reaching the water table and most are diluted within an aquifer prior to reaching a public water system. These Panel members suggested that EPA try to identify conditions that would allow injection of such contaminants above the MCL without endangering drinking water sources. EPA responded that its proposed approach is consistent with its long-standing interpretation of the statutory requirements to assure the protection of USDWs, and with the Legislative History, which states that Congress intended to protect USDWs from present or potential threats to human health, which may include increases in contamination in amounts that by themselves would not cause maximum allowable levels to be exceeded. Furthermore, EPA believes that it would not be a viable option for most small entities to collect the site-specific hydrologic, geologic, and soil information necessary to determine if waste above an MCL could be injected without endangering the underlying USDW. OMB and SBA recommend that EPA solicit comment on the appropriateness of allowing injectate to exceed MCLs under certain conditions, and on specific contaminants, conditions, and allowable levels for which this approach would be appropriate. EPA does not support this recommendation because it currently believes that allowing these high risk wells to inject waste that exceeds MCLs in areas close to drinking water supplies does not meet the statutory requirement to protect public health by not endangering USDWs.

Types and Number of Potentially Affected Small Entities. As indicated above, the types of small entities that may be subject to the rule include owners and operators of three categories of Class V injection wells in SWPAs delineated for community water systems and non-transient non-community water systems that use ground water as a source. The three categories of Class V wells subject to the current draft of the proposed rule are: (1) motor vehicle waste disposal wells; (2) industrial wells; and (3) large-capacity cesspools.

EPA estimates that approximately 4,100 facilities would be subject to these new requirements, of which roughly 4,000 are expected to be small entities. This includes approximately 3,000 small business that operate motor vehicle waste disposal wells, 1,000 small businesses that operate Class V industrial wells, and 30 large-capacity cesspools. Some Panel members were concerned that EPA's methodology for estimating the number of wells in SWPAs may have resulted in an underestimate of the number of affected small entities, because of its assumptions that affected classes of wells are evenly distributed throughout a state. The Panel recommends that EPA request comment on its methodology in the preamble to the proposed rule, and revise it to address the concern raised if possible.

The Panel also recommends that EPA use the proposed rule and preamble to clarify the definitions of three types of Class V injection wells to further assist owners and operators in determining if their wells would be subject to the regulation. First, the Panel recommends that EPA clarify that the new proposed requirements would not apply to Class V drainage wells intended for storm water management that may

occasionally receive minor amounts of waste due to unintentional small volume leaks, drips or spills and that cannot reasonably be separated from potential sources of contamination. Second, the Panel recommends that EPA clarify that only wells at those car washes that are specifically set up to perform undercarriage or engine washing would be considered Industrial Class V wells under the proposed rule. Third, the Panel recommends that EPA clarify that if all motor vehicle waste fluids generated at a service facility are segregated so that none are injected, the facility's Class V well would not be prohibited and could be used to dispose of other waste streams such as storm water, ice melt, and carwash waste water.

The Panel also received comments and data from one SER suggesting that septic systems at funeral homes do not pose a threat to USDWs and recommending that they be classified as "other industrial wells" not subject to this rule. EPA will request comment in the preamble on this recommendation.

Several commenters also questioned the appropriateness of EPA's proposal to include within the scope of the rule all Class V motor vehicle and industrial wells and large capacity cesspools within a state if the state fails to complete a Source Water Assessment by the final statutory deadline of May 2003. While EPA believes this approach is appropriate, it will also request comment on it in the preamble to the proposed rule.

Reporting, Record Keeping, and Other Compliance Requirements. The Panel received comments from five SERs expressing concern that it will be difficult for owners and operators of Class V wells to assess if they are covered by this regulation because they will not know at the time of proposal and promulgation if they are located in a SWPA. The Panel discussed this concern and EPA noted that the proposed rule includes language on how owners and operators can find out if they are located within a SWPA. SBA supports the recommendation of some commenters that the rule include a requirement that UIC program authorities directly notify all known owners of covered Class V wells located in SWPAs of their coverage under this rule .

Most commenters stated that compliance with this rule would be burdensome to small businesses. Four commenters were particularly concerned that clean-up and remediation requirements under RCRA or existing UIC regulations might be triggered by well closures under the proposed rule and questioned whether EPA has adequately factored these potentially high costs into its analysis of the rule's impacts. After discussing this issue within the Panel, EPA agreed that all costs incurred as a result of actions required under this rule, even if not based on rule requirements per se, should be included in its analysis of regulatory impacts, and EPA is currently revising its economic analysis to reflect such costs. The Panel also agreed that in areas where state and local authorities are already requiring closure of certain types of wells without this rule, the costs of closing such wells should not be included in the analysis for the rule.

Interaction with Other Relevant Federal Rules. The Panel received comments from SERs concerning the relationship of the draft proposal with other federal rules. While the proposed rule is closely connected

with (1) the existing regulations governing UIC wells, (2) the Source Water Assessment and Protection Program under the SDWA, and (3) the solid and hazardous waste regulations under RCRA, EPA believes that the proposed Class V rule does not duplicate, overlap, or conflict with UST or RCRA requirements. However, EPA acknowledges that compliance with the proposed rule may trigger remediation and waste management requirements under other federal, state or local law.

Regulatory Alternatives. The Panel discussed the concerns expressed by four of the ten commenters that some owners and operators may not be able to comply with the proposed new requirements within 90 days, especially in cases where the most efficient compliance option is connection to a sanitary sewer or installation of treatment. The Panel thus recommends that the UIC Program Director be allowed to extend the deadline for up to one year in such situations. The Panel also recommends that the preamble to the rule be used to clarify that UIC Program Directors have additional flexibility to extend the deadline through compliance agreements with owners and operators of covered facilities.

In response to comments raised by SERs concerning the burden of well closure on small entities, the Panel recommends that regulatory alternatives to the ban on automotive service wells in SWPAs be considered. During the Panel's deliberations, EPA developed preliminary outlines of two alternative options that served as the basis for the Panel's subsequent discussions. They were:

- 1) Require owners and operators of Class V motor vehicle wells in SWPAs to meet MCLs at the point of injection. This option, would require owners and operators of Class V automotive waste disposal wells to monitor their injectate and sludge and utilize BMPs and/or treatment, as appropriate, to meet MCLs.
- 2) Retain the ban on Class V motor vehicle wells in SWPAs but allow owners and operators to apply for a waiver if they can demonstrate that they meet MCLs at the point of injection.

EPA indicated that it would be willing to co-propose its original option (requiring closure of all Class V motor vehicle wells in SWPAs) and the second of the two options presented above, and to request comment in the preamble on the first option. The Panel endorsed this approach. However, OMB and SBA also suggested that EPA consider expanding the flexibility available under the second option. Because this approach would require a site-specific determination by the UIC Program Director before a waiver for a Class V motor vehicle well in a SWPA could be issued, OMB and SBA believe that the appropriate condition for such a waiver is that the well not endanger USDWs, rather than that it meet all MCLs at the point of injection. OMB and SBA suggested that the UIC Program Director should have the flexibility to identify site-specific situations where exceedence of an MCL for a particular contaminant at the point of injection would not endanger USDWs, and to include in the waiver any conditions necessary to ensure non-endangerment. OMB and SBA recommend that EPA request comment on this option in the preamble as well. EPA does not support this recommendation because it currently believes that

allowing these high risk wells to inject waste that exceeds MCLs in areas close to drinking water supplies would endanger USDWs and would not provide adequate public health protection.

The Panel also recommended that the preamble presentation of the first option include a discussion of EPA's rationale for including additional monitoring requirements beyond those proposed for industrial wells and request comment on appropriate monitoring requirements under this option.

In addition to the above package of regulatory alternatives, the Panel believes EPA should carefully consider all comments received during this outreach process on these and other issues of concern to small entities. A full discussion of comments received and Panel recommendations are included in the final report.

Sincerely,

Thomas E. Kelly, Chair
Small Business Advocacy
Environmental Protection Agency

Don Arbuckle, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Jere W. Glover
Chief Counsel for Advocacy
U.S. Small Business Administration

Cynthia C. Dougherty, Director
Office of Ground Water and Drinking Water
Office of Water
U.S. Environmental Protection Agency

Enclosure